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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on July 23, 1962.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pp. 15–32) is reported at 304 F. 2d 368. The Board's decision and order (R. 75–80)[1] are reported at 131 NLRB 806.

[1] "R." refers to Volume I, Transcript of Record, filed in the court of appeals; "B.A." refers to the appendix to the brief filed by the Board therein. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (App., *infra*, p. 33). On September 18, 1962, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act by granting economic benefits to its employees during the course of a union organizational campaign and immediately prior to a Board-ordered representation election, for the purpose of inducing the employees to reject the union in the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condi-

tion of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

On November 9, 1959, the Union[1] advised the Company by letter that it was engaged in an organizational campaign at the Company's plant, and that a majority of the Company's employees had designated the Union as their bargaining representative. The Union requested a meeting at the Company's earliest convenience to discuss contract terms (R. 33; B.A. 48–50). Although the Company concededly received the Union letter, there is no evidence that it made any reply (R. 33).

On November 4, four days before the Union's letter, the Company invited the employees to attend one of two dinners which would be held that night and the following night in the plant lunchroom (R. 34; B.A. 54). The purpose of the meetings, the Company stated, was to discuss "Some information of vital importance to you, your family, your Company" and the industry (B.A. 54). In apologizing for not giving the employees earlier notice, the Company explained that the "information * * * is of such importance that it should not wait" (B.A. 55). At the meetings

[1] International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO.

Company Vice-President and General Manager, C. V. McDonald, announced that the "floating holiday" for 1959 would fall on the day after Christmas, and that the employees would receive an additional "floating" holiday in 1960 (R. 34; B.A. 27).[3]

On November 16, the Union petitioned the Board for a representation election among the Company's employees, and on December 29, the Board conducted a hearing on the petition. On February 19, 1960, the Board directed that an election be held (R. 33; B.A. 9).

Six days later, on February 25, the Company sponsored an employee dinner at the Pioneer Palace in Fort Worth. Although Vice-President McDonald had stated in November that the additional holiday in 1960 would be a "floating" holiday, he now announced that the employees could vote on whether the new holiday should be "floating" or the employee's birthday. The employees voted in favor of the birthday holiday (R. 34; B.A. 11, 21, 36).[4] McDonald then referred to the pending representation election, and told the employees that their vote would decide whether they "wished to hand over their rights to speak and act for themselves" (R. 35; B.A. 12).

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[3] In 1955, the Company had established its first paid holiday, and had added one each year thereafter, so that by 1958 there were four paid holidays. Early in 1959, it had announced that the additional holiday in 1959 would be a "floating one," *i.e.*, it would come the day following one of the four already established (R. 34; B.A. 24-25, 27, 28).

[4] This was the first time that the employees were allowed to determine when their additional paid holiday would fall (R. 34; B.A. 36).

On March 4, 1960, the Company sent its employees a letter disparaging the Union's "empty promises," and asserting that it would not "take a Union to get additional improvements in the future" (R. 35; B.A. 38–39). An accompanying pamphlet read in relevant part as follows (B.A. 45, emphasis in original):

> FACTS YOU SHOULD KNOW ABOUT YOUR BENEFITS AT EPCO
>
> * * * * *
>
> In *1960* the following benefits have been added or increased (thus far):
>
> Added a SIXTH paid holiday (your birthday)[5] No loss of overtime pay during the week a paid holiday is given. This will mean $5.00 to $6.00 more per employee per holiday
>
> * * * * *
>
> Vacation time extended 1½ days[6]
> Better discount on merchandise purchased
> More recreational activities
>
> * * * * *

---

[5] Under the new overtime system, paid holidays were to be treated as time on the job in computing overtime pay (R. 36; B.A. 13–14). Previously, paid holidays were not counted as time worked in computing overtime pay. The only exception was the July 4 holiday in 1959, when the employees' pay was computed on the basis of the formula alluded to in the March 4 bulletin.

[6] Respondent operated on a five-and-a-half day week, including half a day on Saturday. Prior to the union campaign, the vacation week ran from Friday through Thursday with only one week-end in between. Under the new plan, vacations would begin on a Monday so that an employee taking a week's vacation could leave work at noon on Saturday and return a week from the following Monday. By thus having an extra week-end of leave, his vacation was extended by one and a half days (R. 36–37; B.A. 15–16).

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These benefits [those set forth above as well as those granted in prior years] amount to 42 *cents* per hour *over and above your regular pay*—and have increased approximately 20 percent in the past year alone.

* * * * *

Vote No ——————— Grow With EPCO!

On March 18, 1960, the Board election was held, and the Union was defeated (R. 33).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company announced and granted the sixth holiday and increased overtime and vacation benefits, shortly before the representation election, for the purpose of inducing its employees to reject the Union. Accordingly, the Board found that the Company interfered with and restrained the employees in the exercise of their organizational rights, in violation of Section 8(a)(1) of the Act (R. 76, 39–41). The Board's order directed the Company to cease and desist from the unfair labor practices found and from any like or related illegal conduct, and required it to post appropriate notices (R. 77–78).[1]

III. THE DECISION OF THE COURT OF APPEALS

The court below denied enforcement of the Board's order. It agreed that there was substantial evidence

[1] The Trial Examiner had also found that the Company's action interfered with the election, and recommended that the election be set aside (R. 41). Subsequently, however, the Union withdrew its representation petition, thus closing the representation proceeding (R. 76).

to support the Board's finding that the increased overtime and vacation benefits were introduced and announced for the first time on March 4, 1960, were granted as part of the Company's effort to oppose the Union, and were intended to influence the outcome of the representation election (App., *infra*, p. 21).* Nevertheless, the court held that the grant of these benefits did not violate Section 8(a)(1) because there was no "objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization" (App., *infra*, p. 22). In the court's view, the terms "interfere with, restrain, or coerce" in Section 8(a)(1) are confined to "the use of force and pressure. Persuasive efforts are not outlawed." Since "the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union," they could not "coerce" the employees, but merely "persuade" them, to vote against the Union. (App. *infra*, pp. 29–30.)

REASONS FOR GRANTING THE WRIT

The holding of the court below, that an employer does not commit an unfair labor practice by granting economic benefits prior to a Board election for the

*The court, however, found the evidence insufficient to support a finding that the grant of the extra holiday was so motivated, for there was no indication that the Company had knowledge of the Union's organizational campaign when that holiday was first announced (App., *infra*, pp. 18–20).

purpose of influencing his employees' choice of a representative, is in direct conflict with the decisions of two other circuits. It overturns a long settled rule of great importance to employees and employers under the National Labor Relations Act.

1. The decision of the court below is in direct conflict with *National Labor Relations Board* v. *Pyne Molding Corp.*, 226 F. 2d 818, 820 (C.A. 2), and *Indiana Metal Products Corp.* v. *National Labor Relations Board*, 202 F. 2d 613, 620 (C.A. 7). In *Pyne*, shortly after the union filed a petition for a representation election, the employer granted the employees a wage increase and an extra holiday, and, after the Board directed an election, announced a liberalization of vacation schedules and certain additional benefits. The Second Circuit sustained the Board's conclusion that this action constituted interference and restraint in violation of Section 8(a)(1) of the Act, since the evidence justified the inference that the benefits were granted for the purpose of thwarting the organization of the employees. Similarly, in *Indiana Metal*, after the union appeared on the scene, the employer announced new insurance benefits. The Board found that the employer thereby violated Section 8(a)(1) of the Act, as his purpose was to defeat self-organization. The Seventh Circuit sustained this finding, specifically rejecting as irrelevant the fact that "no strings were attached to the offer and [there were] no threats to withdraw the benefits if the employees persisted in supporting the union" (202 F. 2d at 620).

These decisions[9] rest on the principle that Section 8(a)(1) of the Act bars the employer from using his economic power—whether it take the form of coercion or allurement—for the purpose of influencing his employees' choice of a representative.[10] For an employer to grant benefits to the employees during the course of an organizing campaign or before a Board election, for the specific purpose of inducing the employees to reject the union, is a flagrant example of such use of economic power. It is likely seriously to affect the employees' freedom of choice, because it emphasizes "to the employees that there is no necessity for a collective bargaining agent" (*May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 385).

We do not suggest that the pendency of a Board election would bar an employer from granting a wage increase or other economic benefit in order to achieve a legitimate business purpose (see p. 12, *infra*). Here,

[9] See also, *National Labor Relations Board* v. *Valley Broadcasting Co.*, 189 F. 2d 582, 586 (C.A. 6); *National Labor Relations Board* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *National Labor Relations Board* v. *Thompson & Co.*, 208 F. 2d 743, 748 (C.A. 2); *National Labor Relations Board* v. *Crown Can Co.*, 138 F. 2d 263, 266 (C.A. 8); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).

[10] The "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 686. "[I]nterference is no less interference because it is accomplished through allurements rather than coercion, when, as here, the system is employed to stem a tide of organization * * *." *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240, 244 (C.A. 7), certiorari denied, 320 U.S. 746.

as in many other instances arising under Sections 8(a)(1) and (3) of the Act, the question whether particular conduct of an employer constitutes an unfair labor practice turns upon the motivation from which that conduct springs.[11] Where, as in this case, benefits are granted for the purpose of thwarting the union, Section 8(a)(1) of the Act is violated, just as it is by a promise of benefits which is similarly motivated. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 685–686; *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 739 (C.A.D.C), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Baily Company*, 180 F. 2d 278 (C.A. 6).

The holding of the court below that Section 8(a)(1) only prohibits the employer from using his economic power to defeat the union when his action takes the form of "force and pressure," but not when it takes the form of "persuasion," is incompatible with the foregoing principle and decisions, and constitutes an unwarranted narrowing of the scope of that section.[12]

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[11] *E.g.*, compare *National Labor Relations Board* v. *Brown-Dunkin Co.*, 287 F. 2d 17, 19 (C.A. 10) with *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848, 851 (C.A. 5) (adoption of independent contractor system, with consequent discharge of employees); and *Fiss Corporation*, 43 NLRB 125, 138 with *Jacob H. Klots*, 13 NLRB 746 (movement of plant to another town). See also *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 42–44.

[12] The only judicial support for the view of the court below is a comment by Judge Arnold in his opinion in *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 F. 2d 520, 524 (C.A.D.C.) (App., p. 26, *infra*). We believe that the

2. The court below distinguished *Pyne* and *Indiana Metal*, *supra*, and other similar cases (n. 9, *supra*), on the ground that in those cases, unlike here, the employer had engaged in other unfair labor practice conduct in addition to the Section 8(a)(1) violation. (App., *infra*, pp. 22–25.) This ground, we submit, is insubstantial. In both *Pyne* and *Indiana Metal* the additional unfair labor practices did not have any bearing on the principle to be applied in interpreting Section 8(a)(1); such practices merely served, in the individual case, to establish or buttress the finding that the economic benefits were granted for an anti-union purpose. But the illegal motivation may be established by other circumstances, such as the timing of the employer's action and his announced hostility to the union. Where, as here, the circumstances are sufficient to warrant an inference that the benefits were granted for the purpose of inducing the employees to reject the union, it is immaterial that the employer did not commit other unfair labor practices which would confirm that purpose.

Nor is the court's interpretation of Section 8(a)(1) justified by the other considerations upon which it relied. It is not necessary to restrict the section to "force and compulsion" in order to leave room for the employer's right, guaranteed by Section 8(c) of the

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correct principle was stated by Judge Edgerton in his dissenting opinion in that case (144 F. 2d at 526–527), and the District of Columbia Circuit has adhered to it in the subsequent *Joy Silk Mills* case, *supra*.

Act,[13] to "persuade" the employees that a union is not needed. Nothing in the cases set forth above precludes the employer from expressing his views and opinions on the subject of a union for his employees. The only thing which is precluded is his use of economic power for the purpose of influencing the employees' choice. Moreover, nothing in those cases requires the employer to "stand still" just because a union organizing campaign is under way. He is free to institute changes in wages or other conditions of employment, provided that the changes are motivated by legitimate economic considerations and not by a desire to defeat the union.[14]

3. The decision of the court below, if left standing, would radically change the ground rules under which thousands of union organizational drives and representation elections are annually conducted. For the ability to grant wage increases or other economic benefits at crucial junctures in an organizing campaign is a subtle and effective weapon in the hands of employers who wish to block unionization of their

[13] Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[14] See *National Labor Relations Board* v. *W. T. Grant Co.*, 208 F. 2d 710, 712 (C.A. 4); *National Labor Relations Board* v. *Cleveland Trust Co.*, 214 F. 2d 95, 98–100 (C.A. 6); *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 644–656 (C.A. 2), certiorari denied, 345 U.S. 905; *Burns Brick Co.*, 80 NLRB 389; *W. C. Nabors Co.*, 89 NLRB 538; *Campbell & McLean, Inc.*, 106 NLRB 1049; *Jackson Tile Mfg. Co.*, 122 NLRB 764.

plants. Recognizing the dangers inherent in the use of this technique, the Board has long held that the granting or annoucement of economic benefits during a union organizational campaign or during the period preceding a representation election constitutes unlawful interference with employee rights, in violation of Section 8(a)(1) of the Act, where such action is taken for the purpose of inducing employees to reject the union. *Hudson Hosiery Co.*, 72 NLRB 1434; *Standard Coil Products, Inc.*, 99 NLRB 899; *Reeves Instrument Corp.*, 104 NLRB 610; *Pyne Molding Corp.*, 110 NLRB 1700; *Bata Shoe Co., Inc.*, 116 NLRB 1239; *True Temper Corp.*, 127 NLRB 839, 843–844; *Willard's Shop Rite Markets, Inc.*, 132 NLRB 1146; *Lowell Sun Publishing Co.*, 136 NLRB No. 16.[18] The decision of the court below undermines this well settled Board view. Moreover, it will provide employers opposing unionization with added incentive to resort to the use of economic power, rather than legitimate persuasion. A decision with such serious potentialities clearly warrants review by this Court.

[18] Although there is language in *American Freightways, Inc.*, 124 NLRB 146, which suggests that motive may be irrelevant, the later decisions, *supra*, as well as those in n. 14, *supra*, negate that suggestion. See, in particular, the discussion of *American Freightways* in *True Temper Corp.*, *supra*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1962.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 19106

National Labor Relations Board, petitioner

v.

Exchange Parts Company, respondent

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD SITTING AT WASHINGTON, D.C. (TEXAS CASE)

(June 22, 1962)

Before Rives, Brown, and Wisdom, *Circuit Judges.*

Wisdom, *Circuit Judge:* This case presents the question whether it is an unfair labor practice for an employer to announce benefits to employees shortly before a representation election. In the absence of objective evidence of any taint of restraint or coercion by the employer, the benefits not being conditioned on the employees' renunciation of their right to organize or of any other rights, we hold that the announcement of employee benefits is not an unfair labor practice even if timed to have a persuasive effect on the election.

The Exchange Parts Company of Fort Worth, Texas, rebuilds automobile parts. Before November 1959 its employees were not represented by a union. November 4 the Company mailed to each employee a letter stating that its officials had recently returned

from an industry conference at which "a great deal of emphasis was placed on *employee welfare*". The letter invited the employee and his wife to a dinner that night or the following night to discuss information important to the employees. At the dinners held November 4 and 5 C. V. McDonald, the vice president and general manager of Exchange Parts, announced that the 1959 floating holiday would be the day after Christmas and that the employees would receive an additional floating holiday during 1960. November 9 the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO, wrote the respondent that it represented a majority of the employees and requested a meeting to discuss contract terms. A week later the Union petitioned the National Labor Relations Board for a representation election. The Board held a hearing on the petition December 29 and issued an order February 19, 1960, scheduling an election March 18.

At the annual Christmas party in December McDonald did not announce the date of the 1960 floating holiday. He testified that at that time the Company was investigating whether it would be feasible to allow each employee to take the holiday on his birthday. Around January 1 the study was completed. The Company concluded that the birthday holiday was feasible and allowed the employees to vote on whether they would prefer it to a regular floating holiday. Since the only available place where the Company could hold an unsegregated meeting of all its employees, the Pioneer Palace, was unavailable in January, the dinner meeting was delayed until February 25. At the meeting the employees voted in favor of the birthday holiday. McDonald spoke during the meeting about the pending representation election. He said that the Union organizers had twisted some

of the facts around to put the Company in a bad light, he pointed out the many benefits that the Company had given the employees, and he concluded by urging all the employees to vote in the election.

March 4 the Company wrote the employees asserting that they did not need a Union to obtain additional improvements in the future and asking the employees to vote against the Union. The letter announced as a benefit added in 1960 a new method for calculating overtime in the weeks containing a paid holiday. Under the old system the workers were paid for the hours not worked on the holiday but these hours were not included in the calculation of the workers' overtime earnings; since the regular work week included several overtime hours the employees did not earn as much in a holiday week as in a regular week. The new system gave the workers overtime as well as base rate credit for the holiday and thus removed the reduction in overtime pay. In announcing the change the letter stated, "This will mean $5 to $6 more per employee per holiday." Exchange Parts argues that this new overtime pay system was not introduced by the March 4 letter but instead was initiated July 4, 1959. The system was used that holiday and the Company announced that this was in accordance with company policy, but it did not state clearly that the policy would be followed for subsequent holidays. The Union argued that the system was used then because July 4 fell on a Saturday when the employees normally work only half a day and therefore would not receive a full paid holiday. The new overtime system was not used for later holidays during 1959, which McDonald attributed to an error on the part of the accounting department. McDonald said that it was also an error that the new system was

listed as a new benefit added during 1960 in the letter sent to the employees March 4, 1960.

The March 4 letter also stated that a new vacation system had been adopted during 1960 which would allow the employees to take an additional one and one-half days vacation. Before 1960 each employee was required to take his week of vacation during a regular pay week, beginning Friday morning and ending Thursday evening. The men were paid Friday for the preceding work week. At the end of 1959 the Company shifted the pay week forward one day to give the accounting department an extra day for making up the pay checks before distribution on Friday. The Company then decided to abandon the requirement that a worker's vacation week coincide with the pay week, which with the new pay week would have scheduled the vacations from Thursday to Wednesday, and to allow employees to take a calendar week vacation. The change gave the employee a week-end at each end of his vacation and allowed him to be away for a longer time, although it did not grant him any actual increase in his paid vacation. The Company asserted that it established this policy at the start of 1960 and that during February certain employees took vacations on the new basis. The March 4 letter was, however, the first general announcement to all the employees of this new policy.

I

The parties hotly dispute whether the birthday holiday, the holiday overtime pay, and the change in vacations represent an effort by Exchange Parts to influence the representation election by an increase in employee benefits just before the voting. The hearing examiner found that in 1955 Exchange Parts established its first paid holiday and announced that

it would add an additional paid holiday each year. In 1958 there were four paid holidays. Early in 1959 McDonald announced that another paid holiday would be granted as a floating holiday. November 4 and 5 he announced that the new 1959 holiday would be the day after Christmas and also stated that in 1960 a sixth holiday would be added. Since there was no evidence to indicate that the Company knew of the Union's organizational campaign at that time, these findings clearly negate any inference that the sixth holiday was added as a result of the representation election or in an attempt to influence its outcome. The trial examiner found, however, that the announcement of the holiday was timed to influence the election. He stated, "I see no reason why McDonald could not have followed custom and announced the holiday at the Christmas party, or at least informed the employees the birthday holiday was then under consideration." He also questioned why the announcement of the plan for the birthday was delayed until the February 25 party.

We are unable to accept the imputation of blame to the Company on this point. There is no basis for the examiner's finding that McDonald should have announced the 1960 holiday at the Christmas party, since McDonald already had made that announcement November 4 and 5. Nor is there any rational basis for the hearing examiner to conclude that McDonald was under an obligation to announce at the Christmas party that the birthday holiday was under consideration, under pain of an examiner and the Board concluding that such omission amounted to interference with union organization. On the contrary, it seems reasonable to us for the Company *not* to make an announcement about the birthday holiday that might stir up employee hopes and expectations until it had

determined that the holiday was economically feasible. Finally, we can see no adequate basis for attributing an improper motive to the delay in the announcement until February 25, in view of the finding that a January meeting was not possible because of the unavailability of the Pioneer Palace. Such speculations do not reach the dignity of findings. See *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d 406.

The story takes a different turn when we come to the holiday overtime pay and the vacation period. In its March 4 letter the Company announced both of these as new benefits added in 1960. This letter by itself constitutes substantial evidence of the creation of these benefits. The only question Exchange Parts raises relates to the timing; the employer asserts that the new overtime pay was established in 1959. This assertion, to say the least, is not so overwhelming that it compels acceptance as a matter of law. One might well raise an eyebrow over the contention that both the accounting department and those responsible for drafting the March 4 letter would have made such errors, and that the errors would have gone unnoticed, if the Company really had established the increased overtime pay as a permanent policy July 4, 1959. The new vacation week system may not be of prime importance but is a significant fringe benefit. It is a rational inference from the record that the new system was introduced in 1960 and announced generally for the first time in the March 4 letter. This is not the whole story, however.

The list of benefits in the March 4 letter shows that Exchange Parts, over the years, increased employee benefits as a regular matter of course. This and the announcement in the November 4 letter that the Company was anxious to do more to increase employee

morale would have justified the fact-finder in concluding that the institution of new benefits was not caused by the pending representation election. On the other hand the hearing examiner could have believed that these new benefits were greater than they otherwise would have been. The Company's March 4 letter itself stated that the employee benefits were increased twenty per cent by the additions within the past year. The fact that these new benefits were announced just two weeks before the election in a letter urging the employees to vote against the Union indicates that the benefits were part of the Company effort to oppose the Union. An issue of fact was presented with substantial evidence on either side. In such a case the factual determinations fall to the hearing examiner and the Board, since the demeanor of the witnesses and subtle bits of evidence developed during the trial can be decisive. *Universal Camera Corp.* v. *N.L.R.B.*, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456; *Washington, V. & M. C. Co.* v. *N.L.R.B.*, 1937, 301 U.S. 142, 57 S. Ct. 112, 81 L. Ed. 965. We therefore accept the hearing examiner's and the Board's finding that as to the holiday overtime pay and the vacation period Exchange Parts increased its employee benefits with an intent to influence the outcome of the representation election. This poses squarely the legal question whether such action necessarily constitutes an unfair labor practice as defined and prohibited by 29 U.S.C.A. § 158(a)(1).

The Board itself has said, "We do not mean that an employer is foreclosed from announcing or granting economic benefits during a union's organizational campaign or during the pendency of a Board-ordered election." Matter of Hudson Hosiery Co., 72 NLRB 1434 (1947). But the test stated in that decision is a fuzzy, subjective one: "What is unlawful under the

Act is the employer's granting or announcing such benefits (although determined upon bona fide) *for the purpose* of causing the employees to accept or reject a representative for collective bargaining." (The Board's emphasis.) Taking the other extreme, the Board has also said:

> "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. Applying this test, we find that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8(a)(1) of the Act." American Freightways, Inc., 124 NLRB 146 (1959).

See *N.L.R.B. v. Illinois Tool Works*, 7 Cir., 1946, 153 F. 2d 811, 814; *N.L.R.B.* v. *Ford Brothers*, 6 Cir. 1948, 170 F. 2d 735, 738. Here, the Board seems concerned solely with the *effect* of the timing of the announcement of the benefits. We find, from our study of the cases, that the courts do not accept any of these tests. The proper criterion is whether there is objective evidence of restraint or coercion, such as conditioning the benefits on the employees voting against the union or relinquishing rights of self-organization.

None of the cases we have examined presents as cleanly as this case the question of the right of an employer to grant benefits timed to achieve the persuasive effect that a union is unnecessary. Certain decisions hold the employer guilty of an unfair labor practice, but in all of these cases the increase in benefits was

one part of an overall program of interference and restraint by the employer. On the other hand, at least three decisions hold that the employer was justified in increasing benefits and that this did not constitute a Section 8(a)(1) violation; in these however there was definite evidence indicating that the employer would have made the increases in the absence of the pending election. A consideration of these cases sets the frame of reference for the question raised by the instant case.

In *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1943, 321 U.S. 678, 686, 64 S. Ct. 830, 88 L. Ed. 1007 the Supreme Court laid down the principle that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination". That principle must be applied in context, however. In Medo the Court applied it to an employer who granted wage increases conditioned on the employees abandoning a labor union previously designated as their bargaining representative.

One of the early cases indicating that it is improper to confer benefits on the employees to encourage opposition to a union is *Western Cartridge Co.* v. *N.L.R.B.*, 7 Cir., 1943, 134 F. 2d 240, 244. There the court made the frequently quoted statement that "interference is no less interference because it is accomplished through allurements rather than coercion." Again the facts differ considerably from those of the instant case. The company had required each employee to sign an individual employment contract. It had also encouraged the establishment of a union that was unaffiliated with any larger union organization and that dealt with matters not covered by the individual employment contracts. When an A. F. of L. union attempted to win recognition in the plant the

company opposed it vigorously and urged its employees to stick with the unaffiliated union. The court held that the company dominated the unaffiliated union and that its open hostility to one union and support of another violated the unfettered freedom of choice that the Act intended for the employees to have. The "interference by allurements" in this case represented the support of a competing union rather than any benefit directly conferred on the employees, contrary to the Midwest Piping rule, 63 NLRB 1060 (1945). See *Local 483, Inter. Bro. of Boilermakers v. N.L.R.B.*, D.C. Cir., 1961, 288 F. 2d 166, *cert. denied*, 368 U.S. 832.

In *N.L.R.B. v. Crown Can Co.*, 8 Cir., 1943, 138 F. 2d 263, the employer warned his employees at a meeting that if they insisted on pushing the organization the plant would be closed. At the end of the meeting he said, "If it is a wage increase you want I will see what I can do about it." Four days later there was a general wage increase. The Board found that these actions illegally restrained and coerced the employees. In such a case coercion results from the squeeze in which the employees are placed. They are faced with a dilemma. If they reject the union they can retain their jobs and enjoy increased compensation; if they vote in a union they are threatened with losing the increased benefits and their jobs as well. The increase in benefits operates as a part of an overall scheme that puts substantial pressure on the employees and prevents them from exercizing a free choice as to whether they wish to establish a union.

N.L.R.B. v. West Coast Casket Co., 9 Cir., 1953, 205 F. 2d 902 closely resembles the Crown Can case. Here also the employer threatened that "if it went union, he would close the plant" and during the union's organization campaign announced new eco-

nomic benefits; it announced the new benefits to various employees while interrogating them about their union sympathies. Here, as in Crown Can, the combination of the employer's acts tended to present each employee with the choice that he could go along with the employer or with the union but that he could not receive benefits from the employer and also exercise his right to organize a union.

A bare promise of future benefits is distinguishable from actual establishment of benefits; in some cases it is a fair inference that the benefits are contingent on a rejection of the union. It is well established that an employer cannot offer wage increases conditioned on the employees withdrawing from or voting against a union. *Medo Photo Supply Corp.* v. *N.L.R.B.*, 1944 U.S. 678, 64 S. Ct. 830, 88 L. Ed. 1007; *Joy Silk Mills* v. *N.L.R.B.*, D.C. Cir., 1950, 185 F. 2d 732, *cert. denied*, 341 U.S. 915; *N.L.R.B.* v. *Bailey Co.*, 6 Cir. 1950, 180 F. 2d 278; *M. H. Ritzwoller Co.* v. *N.L.R.B.*, 7 Cir., 1940, 114 F. 2d 432.

A recent case, *N.L.R.B.* v. *Katz*, 1962, — U.S. —, — S. Ct. —, — L. Ed. 2d —, should also be mentioned briefly. In this decision the Supreme Court held that it was a violation of the duty to bargain collectively, imposed by Section 8(a)(5), for an employer, without consulting a union with which it was negotiating, to grant merit increases, wage increases, and announce a more generous sick-leave policy. There, however, the company was in the middle of bargaining negotiations and the changes were matters subject to mandatory bargaining. Such unilateral changes were a circumvention of the duty to negotiate "which frustrates the objectives of Section 8(a)(5) much as does a flat refusal".

Judge Thurman Arnold was one of the first to emphasize that an employer is not guilty of an unfair

labor practice "because he treated his employees well in order to forestall a union movement", or because he reminded them of that fact, claimed credit for it during a period of a union election, and even increased wages during an election period. *Peter J. Schweitzer, Inc. v. N.L.R.B.*, Ct. App. D.C., 1944, 144 F. 2d 520. In that case, just before an election, the employer sent a letter to the employees and during the election campaign put into effect a general wage increase. The letter implied, or might imply, reprisals or a denial of past benefits if the employees voted for the union. The Court therefore enforced the Board's cease and desist order but only "so far as it requires the petitioner to assure its employees that the benefits it is giving and the liberal labor policy it has adopted will not be changed because they vote for a union". The Court explained:

> "We cannot agree * * * that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

The first case we have found in which a court declined to enforce an order of the Board and approved the grant of benefits during a union campaign was *N.L.R.B. v. W. T. Grant Co.*, 4 Cir., 1953, 208 F. 2d 710. In ruling that the wage increase was not improper the Court relied on uncontradicted testimony that the increase was not considered until the store manager learned that a rival store in the same block planned to raise its wage level and that W. T. Grant made a point of paying its employees as well as any

neighboring store. The Court stated, "Certainly it cannot be laid down as a governing rule that during a union campaign, management must deny to its employees increased advantages which in the absence of the campaign would be granted." Similarly, the Court in *N.L.R.B.* v. *Cleveland Trust Co.*, 6 Cir., 1954, 214 F. 2d 95, 100, held that it was not improper for the company to increase wages before a union election when the reasons for the increases did not relate to the election. A contrary principle "would mean that it is the duty of the employer to refrain from benefitting his employees in order to make them more inclined to vote for a union." This Court reached the same result in *N.L.R.B.* v. *The Newton Company*, 5 Cir., 1956, 236 F. 2d 438.

The statute under which the N.L.R.B. issued its cease and desist order, 29 U.S.C.A. § 158(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." Section 157 grants employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The terms "interfere with, restrain, or coerce" have closely overlapping meanings and connotations. We understand the three terms to encompass one general group of activities, rather than to set out three separate categories. Each term must therefore be construed with a view to the implications of the other terms. These words, especially "restrain" and "coerce" are strong ones, which carry a suggestion of force and compulsion. The pertinent dictionary meaning of "interfere" is "to come in collision; to clash; also, to be in opposition; to run at cross-pur-

poses * * * to enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene." "Restrain" is defined as meaning "to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb." The definition given for "coerce" is "to constrain or restrain by force, esp. by law or authority; to repress; curb." Webster's New International Dictionary (2d Ed. unabridged, 1958). The dictionary meanings coincide with the common meanings. We note that these terms stand in contrast to such terms as "persuade" or "induce" which would also describe conduct designed to influence the actions of another but by non-compulsive means.

This provision has been liberally construed. As the court stated in *Rapid Roller Co.* v. *N.L.R.B.*, 7 Cir., 1942, 126 F. 2d 452, 457, "it is not necessary to show duress but only interference, and it is not necessary that the interference shall be successful in preventing organization." The provision has been used to prohibit a multitude of sins: a threat by an employer that he would not rehire any employees who went out on strike, *Collins Baking Co.* v. *N.L.R.B.*, 5 Cir., 1951, 193 F. 2d 483; anti-union interrogation of employees and requests that they withdraw from the union, *N.L.R.B.* v. *Economy Furniture*, 5 Cir., 1960, 284 F. 2d 339; threats by employer that he would close down the plant before it would have a union and the discriminatory discharge of employees because of their union activities, *N.L.R.B.* v. *Ferguson*, 5 Cir., 1958, 257 F. 2d 88; constant surveillance of an employee after the employer has learned of his union activities, *N.L.R.B.* v. *Gate City Cotton Mills*, 5 Cir., 1948, 167 F. 2d 647, 649. All of these employer actions proscribed by the statute bear the identifying

feature of a threat or an act to punish the employees for their union activities. The statutory purpose is to protect the worker from such employer pressures and enable him to decide whether he wishes to join and support a union without the fear that his decision to do so will jeopardize his relations with his employer. Decision enjoining an employer from making a promise of benefits are consonant with this purpose, since such promises exert a similar pressure on the employees: they may exercise their union rights only by sacrificing employment benefits. The promise of a benefit for abstaining from union activities is a more moderate device than the threat of punishment for participating in union activities, but its operation is essentially the same.

The announcement of new benefits by Exchange Parts in the instant case differs tellingly from the actions prohibited by this wide range of cases. Here the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union. The employees were as free after the establishment of the new benefits as they were beforehand to vote for or against the union according to their own wishes, untrammelled by considerations of the impact their decision would have on their job security, compensation, or relations with the employer. Of course, we regard as vital the fact that the benefits were announced before the certification of the union as the bargaining agent of the employees. If, on the other hand, the employees had previously selected a union as their representative, as in *N.L.R.B.* v. *Katz*, the employer's unilateral changes would have been a serious interference with orderly procedure in the collective bargaining process.

The argument that an increase of benefits by the employer may persuade the employees not to vote for the union overlooks the fact that the employer is entitled to try to persuade his employees to vote against a union, provided that he does so by non-coercive means. "Anti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice. In a free democracy, it is the citizen, not the Government, who fixes his own beliefs." *N.L.R.B.* v. *McGahey*, 5 Cir., 1956, 233 F. 2d 406, 409. The right of the employer to make his appeal to the workers is expressly preserved by the statute. "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C.A. § 158(c). Although freedom to increase benefits in an effort to make a union seem unnecessary does not follow as a necessary incident of the right to argue against the union, it is scarcely any more coercive. Also, although the limitation on the expression of views to exclude a threat of reprisal or force or a promise of a benefit is not in terms an exclusive limitation, it is significant that this is where the authors of the provision chose to draw the line. The whole tenor of the statutory language and decisions interpreting it indicates that the evil to which the statute is directed is the use of force and pressure. Persuasive efforts are not outlawed. Testing the increase of benefits effected by Exchange Parts against these considerations, we feel that this action is persuasive, not coercive.

Practical considerations support this result. We would be reluctant to announce any sort of a rule

that inhibited employers from improving working conditions, increasing wages, and reducing hours of labor. Unlike most actions of interference or coercion, an increase in benefits operates to the advantage of workers. It would be ironic if a labor law had the result of discouraging benefits for labor. The problem is intensified by the fact that in many cases it would be difficult—if not impossible—to determine whether an increase of benefits is made to discourage unionization or for other "legitimate" reasons. Labor would stand to lose not only where an anti-union motivation actually existed but also in some cases where the employer for other reasons wished to increase benefits but feared being charged with an unfair labor practice. Extension of the statute's prohibitions to cover this sort of a case would thus act as a burden on both management and labor.

Summarizing, the critical fact in this case is that the benefits carried no coercive element; they were not conditioned upon the employees' relinquishment of any rights. The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice. It is impressive logomachy to turn "allurements" into "coercion" by divining a secret purpose. It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. This is beguiling bewording. But a carrot is not a club. Labor is not a donkey. Persuasion is not coercion.[1]

Enforcement of the Board order is

Denied.

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[1] In an analogous situation this Court held that even during bargaining negotiations an employer may engage in a lockout for the purposes of enhancing the acceptance of the company's terms rather than the union's terms. "A lockout may, under the facts of a particular case, amount to a violation of § 8(a)(1) or § 8(a)(3) or of § 8(a)(5) or all three * * * But un-

less the facts support a conclusion of a violation, then resort to a lockout may not be made a violation simply on the ground that this gives advantage to the employer * * *" NLRB v. Dalton Brick & Tile Corp., 5 Cir., 1962, — F. 2d — . The Supreme Court has said as to Section 8(a)(3): "Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such: only such discrimination as encourages or discourages membership in a labor organization is proscribed." Radio Officers' Union v. NLRB, 1954, 347 U.S. 17, 42, 43, 74 S. Ct. 323, 98 L. Ed. 455. Justice Harlan, concurring in a recent opinion, points out: "What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. * * * Yet a Court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. * * * A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to discourage union membership." Local 357, International Brotherhood of Teamsters, etc. v. NLRB, — U.S. —, —, 6 L. Ed. 2d. 11.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19106

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXCHANGE PARTS COMPANY, RESPONDENT

DECREE

Before RIVES, BROWN, and WISDOM, *Circuit Judges.*

By the COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on May 26, 1961. The Court heard argument of respective counsel on January 30, 1962, and has considered the briefs and transcript of record filed in this cause. On June 22, 1962, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Exchange Parts Company, its officers, agents, successors and assigns, be and it hereby is denied.

Entered: July 23, 1962 (Original Filing Date).

Decree: Filed and Entered July 23, 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962